Anaconda Ericcson Inc. *and* Chauffeurs, Teamsters and Helpers Local Union No. 391, International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America. Cases 11-CA-8790, 11-CA-8818, and 11-CA-9240

May 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 9, 1980, Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the Administrative Law Judge's Decision and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below, and hereby orders that the Respondent, Anaconda Ericsson Inc., Eden, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not expressly found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT lay off bargaining unit employees without notice to or consultation with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

ANACONDA ERICCSON INC.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was held on September 29-October 1, 1980, in Reidsville and Eden, North Carolina, on amended consolidated complaint issued September 17, 1980, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, by Respondent, Anaconda Ericsson Inc.[1] Respondent's answer denies any violation of the Act.

At issue principally is whether Respondent unlawfully suspended one employee and unlawfully discharged four others during the period of contract negotiations and whether, during those negotiations, Respondent laid off bargaining unit employees without notice or consultation and unilaterally withheld a regularly scheduled general

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the absence of exceptions, Member Fanning adopts the conclusion of the Administrative Law Judge that William Black's *Weingarten* rights were not violated when his request to have a union representative present was denied after he was summoned to the office of Employee Relations Manager Matkins and discharged. See Member Fanning's dissent in *Baton Rouge Water Works*, 246 NLRB 995 (1979). *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] Moore, a Pinkerton undercover agent posing as an employee, was brought into the Respondent's plant to investigate the cause of large shortages of copper discovered during a plant audit. Concededly, Moore testified that he smoked marijuana with employees Black, LaPrad, and Walker while working, in clear violation of the Respondent's rules of conduct. However, contrary to the General Counsel's assertion, there is no evidence that Pinkerton supplied this contraband or that Moore engaged in entrapment while furnishing to the Respondent in his regular reports this information which, in part, brought about their discharge.

We hereby correct the following inadvertent errors in the Administrative Law Judge's Decision: substitute "1979" for "1980" in the first paragraph under the section entitled "The Discharges of Black, LaPrad, Broadnax and Walker," and substitute the name "William Berrier" for "Berry" wherever reference is made to the Respondent's plant manager.

[1] By stipulation of the parties, the caption was amended at the hearing to correct the name of Respondent.

wage increase. During the hearing, an agreement as to the course of further bargaining was approved, thereby disposing of paragraph 20(a) of the complaint.

Upon the entire record, including the General Counsel's untimely brief and my observation of witness demeanor, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent engaged in the production of plastic communications cables at its Eden, North Carolina, facility, with annual interstate shipments in excess of $50,000, is an employer engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

On May 25, 1979, following a May 17 election which resulted in an 84–17 vote, the Union was certified as exclusive bargaining agent for 112 production and maintenance employees at Respondent's Eden, North Carolina, facility. As a result of a number of layoffs in 1980 for economic reasons, the bargaining unit presently consists of 55 employees.

B. *The 3-Day Suspension of Caudle*

On June 11, during contract negotiations, employee Caudle was given a 3-day disciplinary suspension for "leaving his position" at the end of his shift on June 5, 1980, before being replaced. It is undisputed that Caudle was an employee-member of the negotiating committee and that a negotiating session was scheduled to commence 30 minutes after conclusion of the shift.

Also undisputed are the essential facts surrounding the June 5 incident. During the course of the shift, Caudle and 23 other employees were specially assigned to assist in an experimental operation involving the stranding of a cable. Each of the employees was assigned to a reel of cable and instructed to apply manual tension to the cable as it was being stranded, so as to prevent the cable from hitting the floor and being damaged.

Several times before the end of the shift at 3 p.m., Caudle informed Supervisor Berrier, who was the only supervisor present at the experimental operation, that he had a negotiating meeting and had to leave at 3 p.m. Berrier, concerned about overtime, arranged for replacements from the second shift and advised the employees they could leave when they were replaced. Shortly before 3 p.m., the replacements began to arrive and many first-shift employees were relieved. Despite the fact that the experimental operation would be completed in 5 to 10 minutes and that more replacements then were arriving, Caudle immediately left his position at the sound of the 3 p.m. buzzer, punching out at 3:03 p.m. His reel was promptly taken up by Supervisor Berrier before the cable struck the ground. Had Berrier not stepped in, it would have been necessary to shut down the machine before completion of the experiment. No other employee left before being relieved and at least one other bargaining committee member, McCullouch, remained to complete the job, checking out at 3:09 p.m. and thereafter attending the bargaining session. The pattern of bargaining for the past year was that, despite a scheduled 3:30 p.m. starting time, Respondent's representatives did not arrive and thus bargaining did not commence until 3:45 to 4 p.m.

Company representatives responsible for making the decision as to discipline testified that Caudle's disregard of responsibility required discipline that his known activities were not a factor in their decision. I credit their testimony and find, based on the entire record, that the discipline was reasonably related to the offense and that this disciplinary action against Caudle would have been taken regardless of his union activities. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). There is not the slightest suggestion on this record that Respondent sought to frustrate employee attendance at negotiating sessions or discourage union activity by imposing unreasonable working hours. Moreover, there is no evidence to indicate that Caudle would have been prevented from making the meeting even had he remained on the job for the several additional minutes required for its completion. Indeed, another member of the negotiating team did just that and presumably arrived at the meeting on time.

No violation is established.

C. *The Discharges of Black, LaPrad, Broadnax, and Walker*

On December 12, 1980, employees Black, LaPrad, Broadnax, and Walker were summarily terminated by Respondent following receipt of undercover investigative reports revealing serious violations of company rules. Each was known by Respondent to be a union adherent and each denied engaging in any wrongdoing. None was on the negotiating committee.

The uncontroverted evidence, which I credit, is that, in August 1979, Respondent, through its corporate vice president of employee relations and its plant manager for employee relations, contracted with Pinkerton's to provide an undercover agent to investigate the cause of large shortages of copper discovered during an audit of the Eden, North Carolina, plant. The contract, consistent with Pinkerton's policy, provided that no information concerning union activity was to be supplied. Periodic reports, submitted by the agent to Pinkerton's district office to be typed, were to be transmitted to Respondent corporate headquarters in Connecticut for further distribution as warranted to company representatives at the Eden plant. This procedure was decided upon because no one at the plant was, at that time, beyond suspicion. The investigation, however, in accordance with Pinkerton's policy, was not limited to copper thefts, but was to provide information generally on security, safety, and supervision.

In September 1979, agent Moore, a young male high school graduate with 2-1/2 years' experience as a Pinkerton's agent, was assigned by Respondent to the third shift as an hourly employee. During the period of September 30 through November 30, he submitted 16 reports which reflected, *inter alia*, that, on a number of occasions, employees Black, LaPrad, and Walker were actually observed smoking marihuana in the plant during working hours;[2] that Black and Walker were actually observed leaving the plant with company tools; and that Broadnax, on a regular basis, was actually observed operating a forklift in a reckless and unsafe manner, causing property damage in the plant. No thefts of copper were observed by the agent at any time on the third shift,[3] and no information relating to union activity at the plant was supplied.

The agent's reports, forwarded to Plant Manager Berry from corporate headquarters, were reviewed by the plant manager for employee relations, Matkins. Berry and Matkins, along with the corporate manager for labor relations, Priggins, met with the agent in early December to insure themselves of the accuracy of the reports and the extent to which the agent actually observed the reported activities. Thereafter, Matkins, Berry, and Plant Superintendent Boyd decided to terminate the four employees, based on the eyewitness account of the agent. In accordance with general corporate policy, final approval was sought and obtained from Corporate Manager of Labor Relations Priggins.

On the morning of December 12, the four employees were separately called to meet with Matkins and Boyd and were informed that they were discharged. Previously prepared termination papers and checks were delivered to each at that time. For appearances sake and so as not to jeopardize his safety, agent Moore also was called in at the same time and "discharged."

Essentially, the General Counsel's *prima facie* case under *Wright Line, supra*, has a number of elements: One, the four employees were known union adherents. As noted, these employees did not participate in contract negotiations.

Moreover, there had been widespread wearing of union "daisies" and buttons at the plant. Two, Black testified that at the December 12 termination meeting Matkins told him his "biggest problem" was that he was a union supporter and that he was discharged because of union activity. Matkins and Boyd denied that such a statement was made and, it should be noted, none of the other three employees testified that any similar statement was made in their meeting, despite the fact that they, too, were known union adherents. I am unable to credit the testimony of Black as it is highly improbable and unsupported by any other evidence in the record. Three, Respondent was found to have violated Section 8(a)(1) during the organizational campaign by engaging in four separate incidents of interrogation at the first-line supervisory, level. *Anaconda Co.—Wire and Cable Div.*, 241 NLRB 1091 (1979). Again it should be noted that the Administrative Law Judge in that case found no other evidence of union hostility; that each of the three employees involved was a known union adherent; that the incidents were isolated and occurred in a large bargaining unit; and that no unlawful discharges or disciplinary actions were alleged. And lastly, each of the four employees denied engaging in the misconduct.

Assuming, without deciding, that these slender threads of evidence satisfy the General Counsel's initial burden of proof, I nevertheless find and conclude (1) that the sole motivation for the December 12 discharges was Respondent's belief, reasonably based on the reports of agent Moore, that each of the employees engaged in serious misconduct at the plant and (2) that Respondent would have taken the same disciplinary action even in the absence of protected activity.

I find that Pinkerton's activity was a *bona fide* investigation initiated by Respondent for legitimate business reasons unrelated to union activity at the plant. There is absolutely nothing in this lengthy record to suggest an unlawful motive on the part of Respondent. While all contracts with Pinkerton's were through corporate and plant employee relations officials, there is no evidence that such activity was beyond their authority. Indeed, it would not be unreasonable for an investigation into employee misconduct to be the responsibility of employee relations officials who would thereafter be responsible for handling not only the disciplinary action but also the arbitration, Labor Board, and EEOC proceedings which not infrequently follow. Moreover, had Respondent wished to employ undercover agents in connection with union activities, it is more likely to have done so during the organizational campaign. Yet no such allegations were made. Nor was there need to determine union sentiments of these four employees, since they admittedly were known union adherents. Finally, there is a possible suggestion, based on evidence lacking in credibility, that the investigation was somehow related to a decertification campaign at the plant. In that connection, employee Martin testified that, on May 30, 1980, nonbargaining unit employee Hensly asked him to assist in obtaining signatures on a petition to "get rid" of the Union; that Hensly gave him a blank petition; that Martin signed the petition and approached other employees; that two such employees told him they would sign the petition if Martin could get the Company to issue property passes to allow them to remove scrap wood from the plant; that Martin spoke with Hensly who assured Martin that he would talk to Matkins about the passes; that, shortly after, Hensly returned and informed Martin that Matkins would fix it so the two employees would get the passes; and that thereafter Martin obtained the signatures of the two employees.

Martin's testimony is not credited as it was unconvincing and unsupported. First, it was uncontroverted that the two employees never sought to remove scrap wood from the plant. Second, Matkins, who was forthright and whose testimony I credit, denies any activity, direct or

[2] The agent testified that he participated in the use of drugs at the plant, but did not supply the drugs.

[3] The agent reported that he suspected copper thefts occurred during the first shift, but Respondent was unable to reassign the agent because his 3-month investigation was nearing an end and there was no way under existing personnel procedures and transfer an employee with no seniority to the preferred first shift.

indirect, in connection with rumored decertification activity. Third, Hensly was not called to testify by counsel for the General Counsel. Fourth, although much was made of Hensly's occasional assignment as acting supervisor (without the traditional authority of a supervisor), the uncontroverted evidence is that on the day in question he was merely another fellow employee at the plant for whose activities Respondent is not liable. And, finally, the uncontroverted evidence is that the investigation was directed neither at the activities of any particular employee or group of employees nor at the union activities of the bargaining unit members as a whole.

I also find Respondent's reliance on the reports of undercover agent Moore in discharging the four employees to be reasonable. Pinkerton's is nationally recognized organization providing security and investigative services. Moreover, Respondent undertook to satisfy itself as to the reliability and accuracy of the agent's reports before taking summary disciplinary action. Matkins and Priggins met with Moore and questioned him, testing to their satisfaction the veracity of the agent and the nature of the proof they would have available to them. Respondent was entitled to rely on the agent's word[4] and was under no legal obligation to concuct a further investigation or to first confront the employees with the charges.

And, finally, I find there to be no disparate treatment of employees identified in the investigative reports. In each case where the agent witnessed misconduct, the responsible employee summarily was discharged. In those instances where the agent observed only an intent to engage in wrongful conduct but no misconduct, Respondent took no disciplinary action. In short, there was no disparate treatment by Respondent.

Accordingly, paragraphs 11 and 14 of the amended complaint are dismissed.[5]

D. *The Request for Union Representation*

Paragraphs 9 and 10 of the amended complaint allege that Respondent, on two occasions, proceeded unlawfully to interview employees after denying their requests for representation.

The first, on December 12, 1979, related to the discharge of Black. The undisputed evidence is that the sole purpose of the meeting was to effectuate a discharge decision previously made. The termination papers already were prepared and a check for wages due had been drawn. Black admitted being informed of the decision before making his request. Under the circumstances, Black was not entitled to representation. *Great Western Coca Cola Bottling Company*, 251 NLRB 860 (1980).

The second, on June 9, 1980, related to the suspension of Caudle. Under the circumstances, Caudle was not entitled to a representative on June 9 for the reason that no meeting occurred. *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). The credible evidence, presented by Matkins and Boyd, and largely admitted by Caudle, reflects that Matkins informed Caudle on June 9 that he was not prepared to discuss the June 5 incident and that, therefore, Caudle did not need a representative. When the meeting finally was conducted on June 13, Caudle was accompanied by a representative of his choosing without objection by Respondent.

Accordingly, no violation is established and paragraphs 9 and 10 of the amended complaint are dismissed.

E. *The Failure To Bargain as to June 13 Layoffs*

Paragraph 20(d) of the amended complaint alleges, and Respondent candidly concedes, a failure to notify or consult with the Union concerning the layoff of approximately 25 bargaining unit employees on June 13, 1980. Respondent, which did consult with the Union as to subsequent layoffs, neglected to do so as to the June 13 layoffs solely due to an oversight. It is undisputed that the layoffs were for economic reasons and that, at a negotiating session prior to June 13, Respondent had explained its established layoff procedures to the union representatives.

Respondent's neglect constitutes an unintentional violation of Section 8(a)(1) and (5) of the Act.

F. *The Unilateral Withholding of the General Increase*

Paragraph 20(c) of the amended complaint alleges that Respondent refused to bargain in good faith by unilaterally withholding a general wage increase from the bargaining unit employees on December 1, 1979. Here again, there is no dispute as to the facts. In each of the 5 years prior to 1979, general wage increases were granted by Respondent. The record is silent, however, as to the amounts of those increases or whether they were uniform and counsel for the General Counsel does not suggest what relief might be appropriate, where, as here, the amount of the increase apparently is discretionary. At the November 8, 1979, negotiating sessions, Union Business Agent Keiger requested that the annual increase be given and stated that, if it were not considered adequate, the Union would then negotiate for an additional increase. Priggins, Respondent's chief negotiator, replied no increase would be given unless negotiated, that the Union had not yet presented its wage demands, and that Respondent would not negotiate on the basis of a retroactive increase. Keiger then presented an 85-cent across-the-board wage demand. Priggins countered with a 5-cent offer. A brief discussion followed concerning the future of the current incentive wage plan. However, at no time thereafter, either in the Union's voluminous correspondence with Respondent or at the several negotiating sessions which followed, was the issue of wage increases again raised.

The General Counsel's brief does not address the merits of this issue and cites no authority for its conclusory statement that Section 8(a)(1) and (5) are violated.

I find, to the contrary, that no violation is established. Despite evidence of annual wage increases to nonbargaining unit employees, the existence of a certified bar-

[4] Although unnecessary to the case, I find Moore to be a thoroughly credible witness, whose testimony was quite convincing.

[5] As a result of credibility findings made in this part of the Decision, par. 8(a) of the amended complaint relating to the alleged threat to discharge Black because of his union activities and pars. 8(d) and (e) of the amended complaint relating to solicitation of signatures for the decertification petition also are dismissed. In this latter connection, I similarly decline to credit Martin's testimony concerning a conversation on June 23 and 25, 1980, with Matkins on the same subject matter. As noted above, Matkins credibly denied any such statement.

gaining representative compels the employer thereafter to bargain over all terms and conditions. It is essential that, during bargaining, the status quo be maintained. Indeed, under the circumstances here, for Respondent to have granted the wage increases would itself have constituted a violation of the Act. The subject of wages was on the bargaining table 3 weeks before the December 1 scheduled increase. The Union did not unconditionally agree to the increase. Rather, it conditioned its approval on the right to bargain, retroactively if necessary, for additional wages over and above Respondent's increase. Thus, there has occurred no unilateral withholding of the scheduled December 1 wage increase.

Paragraph 20(c) of the amended complaint is dismissed.

G. *Threats That Selection of Union Was Futile*

Paragraph 8(b) of the amended complaint alleges two separate instances of threats to an individual employee that selection of a union was futile.

The first, according to the testimony of W. Black, who was discharged for cause in December 1979, occurred in mid-October when his uncle J. Black, a supervisor, approached him and two other employees with newspaper clippings relating to union elections. According to W. Black, J. Black stated that the Union would be of no help to the employees and that to support it was a "waste of time." The two other employees were not called to corroborate W. Black's testimony. J. Black admitted that he kept such clippings on his desk in the work area and that he had two discussions with his nephew about the advantages and disadvantages of a union at the plant. However, such conversations, he testified, were initiated by the nephew who came to him on a personal basis and were strictly between uncle and nephew. As indicated earlier, I am unable to credit the testimony of W. Black. Noteworthy here is the fact that counsel for the General Counsel failed to call the two employees who were present during the conversation. I accept, as the credible one, the version given by J. Black. Noncoercive and nonthreatening discussions, such as those which occurred here between nephew and uncle-supervisor, are not impermissible.

No violation is established.

The second incident, testified to by employee Bolick, occurred on August 13, 1980, when he jokingly asked Supervisor Berrier to get a raise for the employees. According to Bolick, Berrier replied, in a manner which did not reflect he was kidding, "Before you get a raise, the minimum [wage] will catch up with you." In his affidavit to the Board, Bolick admitted stating that no supervisor had ever said that the employees would get no raise until the Union was decertified. Berrier, whose testimony in this respect and as to the Caudle suspension was forthright and convincing, did not recall any such incident and denied ever making such a statement. Given the pattern of Respondent's virtually violation-free conduct both during the organizational campaign and the period following certification, I credit the version of Berrier as the more probable and find that no violation of Section 8(a)(1) occurred based on Berrier's conduct.

H. *The Threat of Layoff*

According to the testimony of J. Smith, a second-shift employee, Supervisor Mills of the third shift said that Smith had better take off his union T-shirt; that the Company had "laid off" (i.e., discharged) some employees and would get some more; and that the Union had filed charges before and lost them. The incident allegedly occurred in a restroom on December 20, 1979, a week after the discharge of the four employees for cause. Mills, a highly credible witness, did not recall any such instance and denied making any such statement. He pointed out, and the testimony throughout the hearing substantiated the fact, that union T-shirts and emblems frequently were worn by the employees. Again, considering the absence of union animus on the part of Respondent during the campaign and thereafter, the fact that the discharges were for cause, and the fact that virtually 9 of every 10 employees in the bargaining unit had supported the Union only several months previously, I find Mills' version to be the more credible and conclude that there was no violation of Section 8(a)(1) based on Mills' conduct.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, Respondent shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[11]

The Respondent, Anaconda Ericsson Inc., Eden, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from laying off bargaining unit employees without notice to or consultation with the Union.

2. Post at its Eden, North Carolina, location copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

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[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."